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Supreme Court of the United States

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF

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REPLY BRIEF

Petitioners respectfully submit this reply brief to address new points raised by the government in its brief in opposition to the petition for writ of certiorari.

INTRODUCTION

Usually the party opposing certiorari argues that the Court should deny review because the lower court correctly decided the case. Here, the government argues that the court of appeals was wrong in its interpretation of Section 140 of Public Law 97-92. (Bf. Opp., pp. 13-15). It asks this Court, nevertheless, to deny certiorari, which would leave the claimed error in force.

With respect to the central constitutional issue, the judges of the court of appeals were unanimous in their interpretation of the Ethics Reform Act and the intent of the 101st Congress in enacting that statute: the Act was intended to construct a system of compensation that included "irreversible" annual COLAs for judges. (*See* Pet., p. 6). The majority determined, however, that under its interpretation of *United States v. Will*, 449 U.S. 200 (1980), no Congress has the power to irreversibly fix future salaries or benefits for judges, even if it does so to preserve the quality and independence of the judiciary.

The panel majority recognized that, in each year at issue, the judicial salary adjustments had "become payable," Congress having determined that COLAs would be paid to General Schedule employees. (*See* Pet., p. 23). The majority held, nevertheless, that those "payable" salary adjustments could be revoked without violating the Compensation Clause so long as Congress acted to revoke them before the COLAs were actually received by judges.

In its brief in opposition, the government takes a different approach than the court of appeals. It argues that no judicial salary adjustment is constitutionally protected until judges have rendered some services under

the adjusted pay rates. (Bf. Opp., p. 16 n.6). The government's resort to this "services rendered" argument further demonstrates the importance of this case and the urgent need for review of these issues by this Court.

ARGUMENT

I. SECTION 140 DOES NOT PREVENT PAYMENT OF JUDGES' COLAS.

The government's first argument (Bf. Opp., pp. 13-15) is that a one paragraph provision of a FY 1982 appropriations resolution, Pub. L. No. 97-92, § 140, 94 Stat. 1200 (1981), governing the use of funds for that year, is permanent law and requires a separate legislative enactment to authorize any salary adjustment for judges, even the COLAs specifically provided for under the Ethics Reform Act.

Section 140 provided that no increase in judges' salaries could take effect without authorization by a statute "hereinafter enacted." The district court and a unanimous court of appeals held that Section 140 did not apply to bar the increases at issue here for two separate reasons: (1) Section 140 expired by its own terms in 1982; and (2) even if Section 140 survived, the Ethics Reform Act was a statute "hereinafter enacted" and, thus, it provided the authorization required by Section 140. (App. 122-30, 8-11, 90-99).[1]

1. Section 140 was a part of a continuing appropriations resolution (Pub. L. 97-92) that expired by its own

[1] There is still a third reason why Section 140 cannot bar petitioners' claims. If Section 140 does apply to judges' COLAs, judges are the only federal employees who are not entitled to receive annual COLAs. This discriminatory application would render Section 140 unconstitutional. *See Hatter v. United States*, 121 S. Ct. 1782 (2001).

terms on September 30, 1982.[2] (*See* App. 8-9). The court of appeals explained that, despite its reference to later enacted statutes, Section 140 did not have the markings of permanency sufficient to overcome its clearly stated termination date. (App. 8-10, 90-99).

The government argues that Section 140 must have been intended to be permanent because of its reference to any act passed "after its enactment" and its prohibition of judicial salary adjustments other than those authorized by Act of Congress "hereinafter enacted." (Bf. Opp., p. 14). The government argues that, since judicial salaries were not scheduled to be adjusted until the beginning of the next fiscal year (after Pub. L. 97-92 expired), Congress must have intended Section 140 to survive the clear termination date, or it would have served no purpose.

The court of appeals considered and rejected this argument. (App. 11, 95-98). Contrary to the government's assumptions, there was a possibility of adjustments to judges' salaries before the scheduled termination date of Pub. L. 97-92 and, therefore, Section 140's requirements would have applied to these increases.

The court of appeals also properly rejected the argument that the intent of the 1981 Congress may be discerned from the actions of later Congresses in adopting Section 140 resolutions in subsequent years. (App. 9-10).

2. Section 140 allows for increases authorized by statute "hereinafter enacted." Section 704 of the Ethics Reform Act constituted that authorization. (App. 173-75). According to the government, even though the Ethics Reform Act mandates the payment of COLAs, an additional statute must be passed each year to authorize each

[2] Pub. L. 97-92 expired on March 31, 1982, but its provisions were extended to September 30, 1982, by Pub. L. No. 97-161, 96 Stat. 22 (1982).

adjustment in judges' salaries. In other words, unlike for members of Congress and executive level officers, there is no automatic COLA for judges. The government does not explain why judges were included in Section 704 if a separate statute must still be passed to authorize any adjustments for judges.[3] Moreover, if judges were not entitled to automatic COLAs under Section 704 without separate Section 140 authorization, it would not have been necessary to enact the statutes challenged here that purported to block payment of judicial salary adjustments.

The government's Section 140 arguments are based on a critical faulty premise. The government argues that, since there has been no increase in judicial salaries under the Ethics Reform Act without specific Section 140 approval, subsequent Congresses must have believed that Section 704 did not constitute an "Act of Congress hereinafter enacted" for purposes of Section 140. Petitioners disagree with the government's conclusion. But, more important, the premise on which it relies is in error.[4] There *have been* judicial salary increases based on the authority of the Ethics Reform Act alone and without reference to Section 140.

The Ethics Reform Act provided three separate salary increases for judges:

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[3] The government contradicts itself when it argues later in its brief that the Ethics Reform Act "authorized an adjustment to judicial salaries . . . *without the need for further congressional action* . . . ." (Bf. Opp., p. 17 (emphasis supplied)).

[4] The government made the same error in the court of appeals and corrected the error. (*See* Motion of Appellant To Correct A Misstatement In Its Briefs (Reply App. 1-2), and Response To The Motion Of Appellant To Correct A Misstatement In Its Briefs (*id.* at 3-5)).

- Section 702 of the Act restored cost-of-living adjustments, payable under the prior law, for 1988 and 1989. Pub. L. No. 101-194, § 702, 103 Stat. 1767-68 (1989). Section 702 contained a specific waiver of Section 140 for these prior law increases.[5]
- Section 703 of the Act provided for a 25% increase in salaries effective January 1, 1991. (App. 171-72). There was no waiver of Section 140 in Section 703 and no subsequent Section 140 resolution was passed. The 25% increase was paid on January 1, 1991.
- Section 704 of the Act provided for payment of annual cost-of-living adjustments. (App. 173-75). Section 704, like Section 703, took effect on January 1, 1991. Again, there is no mention of Section 140.

The failure to mention Section 140 in Section 704, like the failure to mention Section 140 in Section 703 and the payment of the 25% increase authorized therein, is conclusive proof that no further authorization was required for cost-of-living adjustments provided for under the Act.

Petitioners respectfully submit that the viability of Section 140 is not an issue and need not be addressed in any review of this case. We urge the Court to limit its review to the constitutional issues raised in the petition for certiorari. If, however, the Court believes Section 140 is an issue, the issue should not negatively impact petitioners' claim without a review of the entire case by this Court.

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[5] Some members of Congress may have assumed that Section 140 did apply to payments for the pre-Ethics Reform Act years.

II. THE GOVERNMENT'S OTHER ARGUMENTS DEMONSTRATE THE NEED FOR REVIEW.

The government's opposition raises additional points to which petitioners briefly respond *seriatim*.

1. There is no prior "services rendered" requirement in Article III. In the court of appeals the government argued that this Court's decision in *United States v. Will*, 449 U.S. 200 (1980), holds that some service must be rendered by judges under the adjusted pay rate before a COLA vests.[6] The government offered little support for this contention and none of the opinions of the court of appeals addressed the argument. The government asserts the argument again here, however.

The government apparently recognizes that, under the panel majority's "not protected until received" rationale, any element of compensation to be received in the future, even judges' retirement benefits, can be revoked at any time before the judges' actual receipt of those benefits. (*See* Pet., p. 10). Resort to its "services rendered" argument allows the government to argue that retirement benefits are safe from reduction because those benefits "may be regarded as a deferred portion of a judge's *current* compensation for *current* services that cannot hereafter be 'diminished'." (Bf. Opp., pp. 22-23 n.9 (emphasis in original)). The court of appeals did not adopt the "services rendered" rationale, and the rationale it did adopt leaves no room for debate: judges' retirement benefits, like any other element of compensation to be received in the future, are not protected by the Compensation Clause.[7]

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[6] (Brief for the United States, pp. 16-17, 48-49).

[7] By arguing that retirement benefits are deferred compensation, the government proves too much. Under precisely the same rationale, the right to regular cost-of-living

Moreover, the government's alternative argument is no more valid than the rationale used by the majority below. In *Will*, the Court held that Article III protection attached to salary adjustments when those adjustments *became law*, which, under the law at issue in *Will*, was midnight on October 1 of each year. (*See* Pet., pp. 26-27 & n.20). There was no "services rendered" requirement stated or implied in the Court's rationale. Under the government's "services rendered" theory, the Court in *Will* would not have had to analyze the statute there and determine when the adjustment became law to decide when "vesting" occurred. (*See id.*, pp. 27-28). The *Will* Court could have decided the issues simply on the basis of whether services had been rendered or not. And, had it done so, the *Will* Court would have ruled for the government, rather than the plaintiff judges, on the claims asserted for Year One.[8] Petitioners respectfully submit that the relevant inquiry is when the law setting compensation takes effect, not when a judge first renders service under the adjusted pay rate. (*See id.*, pp. 26-27).

2. To bolster its arguments that only pre-existing pay levels are protected, the government attempts to add the adjective "pre-existing" to the Compensation Clause. (Bf. Opp., p. 17). The government also attempts to change the tense and thus the meaning of the Clause. (*Id.*, p. 16). Whereas the Constitution directs that judges "shall, at stated Times, receive" (present or future tense) a "Compensation," the government claims that the Clause only protects that which has been "previously 'receive[d].' " (*Id.*). Moreover, the right to receive compensation "at

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adjustments is certainly a part of a judge's compensation package for current services. (*See Hatter*, 121 S. Ct. at 1798-00 (Scalia, J., concurring in part, dissenting in part)).

[8] In Year One, the effort to bar the adjustment came shortly after midnight on October 1. Obviously, some judges had not yet begun rendering services in the early hours of October 1.

stated Times" should leave no question that Congress has the power to establish irrevocable judicial pay adjustments, payable at future "stated Times." (*See also* Pet., pp. 15-18).

3. The government complains that, if petitioners prevail, district judges will be paid more than members of Congress and as much as Cabinet secretaries; and circuit judges will earn even more. (Bf. Opp., p. 21). But neither the Constitution nor any statute prohibits judges from receiving higher salaries than these officers. Indeed, for many years judges received higher pay because the Compensation Clause prevented any reduction in their salaries, whereas the salaries of other officers were not protected. *See Booth v. United States*, 291 U.S. 339 (1934); *O'Donoghue v. United States*, 289 U.S. 516 (1933).

The government argues that, in enacting the Ethics Reform Act, Congress intended that "salary parity" be maintained among judges, members of Congress and Executive Branch officials covered by the Act. (Bf. Opp., p. 21). But parity is referenced only in Section 701 of the Act, which governs increases in pay received pursuant to the Quadrennial Citizen Commission's Recommendations. Pub. L. No. 101-194, § 701(i), 103 Stat. 1766 (1989). Significantly, Section 703, which provided for the 25% increase payable January 1, 1991, has no parity requirement. In fact, Senators were not included in that increase. (App. 172, Ethics Reform Act § 703(a)(2)(B)). Therefore, Section 703 not only did *not* require parity, it *mandated disparity*. Similarly, the COLA provision at issue here, Section 704, says nothing about parity. If Congress intended that judges' COLAs would be paid only when members of Congress received adjustments, it would have so provided.

4. The government turns the District of Columbia Circuit's decision in *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), upside down in an effort to avoid its clear application here. (Bf. Opp., pp. 20-21). The *Boehner* court held that the Ethics Reform Act's COLA provisions fixed

by law future salaries of members of Congress and judges. (*See* Pet., pp. 22-23). If those salaries were established by law for purposes of Article I, they were also established by law for purposes of Article III.

5. Petitioners agree that Congress can prevent judicial COLAs from going into effect by withholding comparability adjustments for General Schedule employees. (Bf. Opp., p. 19). The payment of COLAs to General Schedule employees is the one condition to the payment of COLAs to judges. Once that condition has been satisfied, however, as it was in each of the years at issue here (Pet., pp. 23-24), judicial salaries are irrevocably altered under any test for vesting. (*See id.*, p. 28 n.21).

6. The government's statement that "there has been no reduction in judges' stated legal salary" (Bf. Opp., p. 20) is wrong. (*See* Pet., p. 24). The panel majority below recognized that judges' stated legal salaries had been reduced in each of the years in question. All conditions for payment had been satisfied and "everything necessary" for payment had occurred "except for the passage of time." (App. 23). The majority below held that stated legal salaries can be reduced at any time before they are received.[9]

7. The government says that here, unlike in *Hatter v. United States*, 121 S. Ct. 1782 (2001), there is no unconstitutional discrimination. It argues that in *Hatter* judges were treated differently from other high-level officials, whereas here members of Congress and certain members of the Executive Branch were also denied COLAs. But the fact that Congress also withheld the COLAs from a small

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[9] Thus, if one Congress enacts a salary schedule that provides for increases to be received in future years (*e.g.*, a 15% increase to be received in 5% increments over three years), the second and third payments could be rescinded by the next Congress, even if the prior Congress had specifically provided that the rights to the increases were intended to "vest" immediately.

group of other federal employees does not avoid the discriminatory effect of the blocking statutes. *See id.* at 1793 (considering the "history, context, statutory purpose, and statutory language" to determine that "federal employees [was] the appropriate class" against which to measure the alleged discrimination). In addition, under the government's Section 140 theory, judges are the *only* federal employees not entitled to annual COLAs. (*See supra*, at 2 n.1).

The 101st Congress determined that there was a need to include, as a component of judges' compensation, annual COLAs that would not be subject to the kind of political maneuverings that had frustrated the payment of COLAs under the prior law. (*See* Pet., pp. 20-21). Once that Congress enacted the law to provide these adjustments, to deny their payment to judges when all other career federal employees receive them is discrimination prohibited by *Hatter*.

CONCLUSION

If anything, the government's opposition provides additional bases for granting certiorari. Petitioners respectfully submit that, for all of the reasons stated in the petition and in this reply, the petition for certiorari should be granted and limited to the constitutional questions addressed in the position.

Respectfully submitted,

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November, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SPENCER WILLIAMS, et al., Plaintiffs-Appellees,	)	
v.	)	Nos. 00-1254, 00-1255
UNITED STATES Defendant-Appellant.	)	

MOTION BY THE APPELLANT UNITED STATES TO CORRECT A MISSTATEMENT IN ITS BRIEFS

The defendant-appellant United States hereby moves to correct a misstatement in its opening and reply briefs in the above-captioned case.

As the Court is aware, this case involves a claim by the plaintiff Article III judges that they are constitutionally entitled to certain cost-of-living increases that were stopped by Congress before they went into effect. The defendant/appellant United States has argued that the plaintiffs are not entitled to these salary increases, in part because of Section 140 in Public Law No. 97-92 (95 Stat. 1200 (1981)). That section provides that funds appropriated in the future shall not be expended to increase the salary of any federal judge except as specifically authorized by Act of Congress.

In our opening appellate brief, at page 10, we described the enactment of the Ethics Reform Act of 1989, and how that statute, among other things, raised the basic pay for federal judges by 25%. We stated that in Section 702(c) of the Ethics Reform Act (103 Stat. 1768), Congress had provided the specific authorization required by Section 140 for this 25% increase. Having discussed this

matter with opposing counsel, we now recognize that our statement is in error. Instead, Section 702(c) provided the Section 140 authorization for a different increase provided to federal judges by the Ethics Reform Act (restoration of a prior increase in basic pay). (The relevant statutory provisions are reprinted in the Appendix in this case at pages 130-31.)

In addition, we made this same mistake in our reply brief at page 9. And, we recall that this issue arose at oral argument. Although we correctly pointed out at argument that Section 140 was specifically mentioned in Section 702(c) of the Ethics Reform Act, it was to authorize a different basic pay increase for judges, rather than the 25% increase.

We apologize to the Court and to opposing counsel for this error.

For the foregoing reasons, the appellant United States moves to correct a misstatement in it appellate briefs in this matter.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SPENCER WILLIAMS, et al.,	)	
	)	
Plaintiffs-Appellees,	)	No. 99-1572
vs.	)	
UNITED STATES,	)	
	)	
Defendant-Appellant.	)	

RESPONSE TO THE MOTION OF APPELLANT TO CORRECT A MISSTATEMENT IN ITS BRIEFS

Plaintiffs-Appellees have no objection to the motion of the Defendant-Appellant, United States ("defendant"), to correct a misstatement made in its briefs and at oral argument. Defendant's motion, however, does not explain the significance of the error it now acknowledges.

1. In this appeal, the defendant argues that before judges may receive any salary increase, including annual cost-of-living adjustments, Congress must pass a statute pursuant to Section 140 of Public Law No. 97-92, 95 Stat. 1182 (1981) ("Section 140"), specifically authorizing payment or waiving the application of Section 140. In opposition, plaintiffs argue that even if Section 140 was viable in 1989, when the Ethics Reform Act, Pub. L. No. 101-194, 103 Stat. 1716 (1989), was adopted, that Act provided any specific authorization which defendant claims is required by Section 140. (*See* Appellees' Brief, pp. 51-54).

The Ethics Reform Act provided three separate salary increases for judges:

- Section 702 of the Act restored cost-of-living adjustments payable under the prior law for 1989

and 1990. Section 702 contained a specific waiver of Section 140. *See* Ethics Reform Act § 702(c).

- Section 703 of the Act provided for a 25% increase in salaries effective January 1, 1991. There was no waiver or other reference to Section 140 in Section 703 and no subsequent Section 140 resolution was passed. The 25% increase was paid on January 1, 1991. The Ethics Reform Act thus provided the only authority required for payment of this salary increase.

- Section 704 of the Act provided for payment of annual cost-of-living adjustments. Section 704 also took effect on January 1, 1991. As in Section 703, there is no mention of Section 140.

The failure to mention Section 140 in Section 704, like the failure to mention Section 140 in Section 703, is conclusive evidence that no further authorization was required for payments provided for in that Section of the Act. Plaintiffs respectfully submit that it is impossible to distinguish between the payment of the 25% increase effective January 1, 1991, provided for in Section 703 and the payment of cost-of-living adjustments effective January 1, 1991, provided for under Section 704. Thus, assuming Section 140 had any continued viability at the time the Ethics Reform Act was enacted, that Act either superceded Section 140 or constituted a statute "hereinafter enacted" in compliance with Section 140. (*See* Appellees' Brief, pp. 51-54).

2. Another statement in defendant's motion requires clarification. In its introductory paragraph (page 1), the defendant inaccurately describes plaintiffs' claims as seeking "certain cost-of-living increases that were

stopped by Congress *before they went into effect.*" (Emphasis added). This statement is inaccurate.

Plaintiffs claim they are entitled to cost-of-living adjustments once the *statute* authorizing those payments took effect, or, at the latest, once all conditions to payment have been satisfied. (*See* Appellees' Brief, pp. 39-43).

All the payments at issue here were authorized by a single law, Section 704, not a series of laws enacted each year as was the circumstance before the Court in *United States v. Will*, 449 U.S. 200 (1980). See *Boehner v. Anderson*, 36 F.3d 156, 161 (D.C. Cir. 1994), where the Court emphasized the important distinction between the effective date of the statute authorizing all future COLA's (*i.e.*, January 1, 1991), and the date upon which the payment of each COLA first occurs (*i.e.*, the first day of the first pay period following January 1). Under the new Act, the annual adjustments do not involve lawmaking; these annual adjustments are merely "calculations performed by non-legislative administrative staff, following a specific formula provided by Congress in the Act." *Schaeffer v. Clinton*, 54 F. Supp. 2d 1014, 1024 (D. Colo. 1999). Judges' rights to "compensation" are fixed by law, not by ministerial acts by administrative personnel. Article III protection vests when the *statute* establishing the pay takes effect. *United States v. Will*, 449 U.S. at 230.

Respectfully submitted

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